APPENDIX A

SUPREME COURT OF OHIO

Case No. 2007-1357

[Filed October 31, 2007]

State of Ohio	)
	)
v.	)
	)
Azzam Ahmed	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals: No. 88315)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

Journal Entry and Opinion No. 88315

[Decided May 31, 2007]

STATE OF OHIO	)
PLAINTIFF-APPELLEE	)
	)
vs.	)
	)
AZZAM AHMED	)
DEFENDANT-APPELLANT	)
	)

JUDGMENT:
AFFIRMED; REMANDED
FOR CLARIFICATION

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-437437

BEFORE: Sweeney, P.J., Stewart, J., and Boyle, J.

RELEASED: May 31,2007

JOURNALIZED: JUN 11 2007, VOL 636 NO 949

ATTORNEYS FOR APPELLANT

Jay Milano
Tikvah Shacther
Rachel May Weiser
2639 Wooster Road
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE

William Mason
Cuyahoga County Prosecutor
Carol M. Skutnik, Assistant
Prosecuting Attorney
James A. Guitierrez, Assistant
Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, P.J.:

{¶1} Defendant-appellant, Azzam Ahmed ("defendant"), appeals from his resentencing in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm and remand for clarification.

{¶2} On May 20,2003, defendant was indicted on 53 counts, including gross sexual imposition, sexual battery, and rape. The matter proceeded to a jury trial and defendant was found guilty on two counts of rape, seven counts of sexual battery and 11 counts of sexual imposition. Two of the counts of sexual battery were merged with the two counts of rape for purposes of sentencing and defendant received a maximum term

of 45 years in prison.[1] Defendant appealed to this Court and we affirmed the conviction but reversed and remanded for resentencing. See *State v. Ahmed*, Cuyahoga App. No. 84220, 205-Ohio-2999.

{¶3} At the re-sentencing hearing on May 23, 2006, the trial court did not merge the two counts of sexual battery with the two counts of rape and increased the previous sentence of 45 years to 55 years by ordering that the maximum sentences for each felony offense be served consecutively. Defendant timely appealed from his resentencing, raising three assignments of error for review.

{¶4} "I. The sentencing criterea [sic] imposed by the State of Ohio through Revised Code 2929. as interpreted in *State v. Foster* 109 Ohio St.3d 1; 2006 Ohio 856 (2006) [sic] violates the Sixth Ammendmant [sic] of the Constitution of the United States.

{¶5} "II. The trial court erred in imposing the maximum consecutive sentence allowed upon the appellant, violating the constitution [sic] of the Sate [sic] of Ohio and the United States of America."

{¶6} Since the first two assignments of error are interrelated, we shall address them together. Defendant asserts that his maximum consecutive 55-year sentence for two counts of rape, seven counts of sexual battery and 11 counts of sexual imposition is excessive and contrary to law because the trial court did not consider the factors set forth in R.C. 2929.12.

---

[1] Original Sentencing Transcript at page 4748.

Specifically, defendant maintains that he should have been given community controlled sanctions, that he has always been a law-abiding citizen, that he is not likely to offend because his medical license was taken away, that he has shown remorse for the offenses, and that the 55-year term amounts to a life sentence.

{¶7} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found certain provisions of Ohio's sentencing statute unconstitutional, in light of *Blakely v. Washington* (2004), 542 US. 296, 124 S.Ct 2531, 159 L.Ed.2d 403, 159 L.Ed.2d 403, because said provisions required judicial fact finding to exceed the sentence allowed simply as a result of a conviction or plea. The court therein concluded "***that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at ¶ 100.

{¶8} While courts are no longer duty-bound to make statutory findings, trial courts are still required to consider the general guidance factors contained in R.C. 2929.11 and R.C. 2929.12 in their sentencing decisions. See *State v. Duff,* Licking App. No. 06CA81, 2007-Ohio-1294; *State v. Diaz*, Lorain App. No. 05CA008795, 2006-Ohio-3282. Accordingly, while judicial fact-finding is no longer required before a court imposes consecutive or maximum prison terms, such findings can be a useful aid for an appellate court in ascertaining and understanding the trial court's rationale behind its imposition of a certain sentence.

See *State v. Green,* Cuyahoga App. No. 88096, 2007-Ohio-1291.

{¶9} Here, our review of the resentencing hearing shows that the trial court did consider the general guidance and statutory factors when imposing the maximum consecutive sentences. The trial court sentenced defendant to consecutive maximum terms based on the physical and mental injuries suffered by his victims, the position of trust the defendant held at the time of the offenses, and the fact that he used this position to facilitate the offenses, and on its finding that "there has never been a situation like this where a doctor so violated the interest and the responsibility that he's had to his client. And so, therefore, the Court is in a situation where the Court has to look out for what are the best interests of today and the impact his conduct has had on society, and not just women, on society in general. That they can be so betrayed by a person of trust." (Tr. 16-17).

{¶10} During sentencing, the court appeared to intend to impose a combined sentence of 45 years.[2] The transcript of the plea hearing indicates that the trial court found, as a matter of law, that two counts of sexual battery merged with two counts of rape for purposes of sentencing and imposed a sentence of 45 years. However, the court's sentencing entry imposed a combined sentence of 55 years. It is a fundamental principle of appellate review that the court speaks only through its journal. *Kaine v. Marion Prison Warden* (2000), 88 Ohio St.3d454, 455. Do to the significant

---

[2] Original Sentencing Transcript at page 4748.

discrepancy between the court's stated intent to impose a 45-year sentence and the journal entry that reflects a 55-year sentence, we remand this case back to the trial court to clarify its intentions by reconciling the journal entry.

{¶11} Assignments of error I and II are overruled.

{¶12} "III. The trial court erred in allowing bail money, provided by the wife of the appellant to be applied to fines levied, constiuting [sic] an unlawful taking of property in violation of the Constitution of the United states [sic] and the State of Ohio."

{¶13} In his third assignment of error, defendant claims that the trial court erred in applying a $50,000 bond toward the payment of fines imposed by the trial court.

{¶14} Bail of any type deposited by an accused is subject to forfeiture proceedings pursuant to R.C. 2937.40(C). Once bail is deposited in the clerk's office by an accused, the court can lawfully apply the deposited bail toward the satisfaction of any penalty, fines, or costs assessed against the accused. R.C. 2937.40(C). The question of whether the bail was deposited by the accused or by someone other than the accused is a question of fact left to the discretion of the trial court. *State v. Howard* (June 1,1984), Clark App. No. 1909.

{¶15} Here, the record demonstrates that the trial court ordered a bond to be posted in the amount of $50,000 on May 21, 2003. However, the record does not contain the bond and there is no evidence of who

actually posted it. Defendant claims that his wife provided the bond money and that his then attorney signed a clerk's office form, which authorized the application of this money to any fines or costs, which the court might ultimately impose. However, as previously noted, neither the bond nor the clerk's office form is contained in the record.

{¶16} An appellate court's review is limited to the record presented before it. See App.R. 9 and 12(A)(1)(b). An appellant has the burden of providing a record on appeal. See App.R. 9(B) and 10(A). This duty falls upon the appellant because the appellant has the burden on appeal to establish error in the trial court. See App.R. 9(B). When the record is incomplete or unclear, an appellate court must presume the regularity of the trial court's proceedings and affirm its decision. See *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 409 (where portions of the record are omitted, which are necessary for effective review, the appellate court must affirm).

{¶17} Since the record is unclear exactly who posted the bond, we are unable to review defendant's assignment of error for lack of a complete record, and we must presume the regularity of the trial court proceedings.

{¶18} Assignment of Error III is overruled.

Judgment affirmed; cause remanded for clarification of sentencing.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, PRESIDING JUDGE

MELODY J. STEWART, J.,and
MARY J. BOYLE, J.,CONCUR

APPENDIX C

STATUTES

TITLE 29. CRIMES --PROCEDURE
CHAPTER 2907. SEX OFFENSES
SEXUAL ASSAULTS

ORC § 2907.02 (2008)

29 ORC § 2907.02. Rape

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the frst degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstandig sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, and instead the court shall sentence the offender as

otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(l)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not he admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

29 OCR § 2907.03. Sexual battery

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

(2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

(3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

(4) The offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse.

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.

(6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplmary authority over the other person.

(7) The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.

(8) The other person is a minor, the offender is a teacher, administrator, coach, or other person in

authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution.

(9) The other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.

(10) The offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.

(11) The other person is confined in a detention facility, and the offender is an employee of that detention facility.

(12) The other person is a minor, the offender is a cleric, and the other person is a member of, or attends, the church or congregation served by the cleric.

(B) Whoever violates this section is guilty of sexual battery. Except as otherwise provided in this division, sexual battery is a felony of the third degree. If the other person is less than thirteen years of age, sexual battery is a felony of the second degree, and the court shall impose upon the offender a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the second degree.

(C) As used in this section:

(1) "Cleric" has the same meaning as in section 2317.02 of the Revised Code,

(2) "Detention facility" has the same meaning as in section 2921.01 of the Revised Code.

(3) "Institution of higher education" means a state institution of higher education defined in section 3345.011 [3345.01.1] of the Revised Code, a private nonprofit college or university located in this state that possesses a certificate of authorization issued by the Ohio board of regents pursuant to Chapter 1713. of the Revised Code, or a school certified under Chapter 3332. of the Revised Code.

29 ORC § 2907.06. Sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired.

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least

eighteen years of age and four or more years older than such other person.

(5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence.

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree. If the offender previously has been convicted of a violation of this section or of section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.12* of the Revised Code, a violation of this section is a misdemeanor of the fist degree.